IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

No. 87-5468

SAMUEL BICE JOHNSON,
*Petitioner,*

vs.

THE STATE OF MISSISSIPPI,
*Respondent.*

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI**

# MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Association of the Bar of the City of New York ("Association") hereby respectfully moves for leave to file the annexed brief *amicus curiae* in support of Petitioner Samuel Bice Johnson, as provided in Rule 36 of the Rules of this Court. The consent of the attorneys for Petitioner has been obtained. The consent of the State of Mississippi was requested, but refused.

The Association, presently comprised of more than 17,000 lawyers admitted to practice in the State of New York, has since its organization in 1871 developed nationally recognized expertise in its fields of interest, and a long-standing commitment to improvement of the criminal justice system. The Association has particular expertise in New York law and procedure.

Because the judgment that Respondent refused to credit was a finding by New York's highest court that Petitioner's conviction, used as an aggravating circumstance to support the death sentence, was a nullity under New York law, the Association believes it can bring a uniquely well-informed viewpoint to this case.

Petitioner will necessarily concentrate on the capital law issues presented in this case. It is the view of the Association, however, that the judgment below threatens an entire body of jurisprudence outside the death penalty area. Specifically, the Association is concerned that an affirmance would upset a well-settled body of constitutional law in non-capital cases -- squarely grounded in the decisions of this Court -- preventing the use of constitutionally invalid prior convictions in subsequent guilt or sentencing proceedings.

WHEREFORE, the Association respectfully requests that its motion for leave to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

# BRIEF OF THE COMMITTEE ON CIVIL RIGHTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Committee on Civil Rights of The Association of the Bar of the City of New York (the "Association") respectfully submits this brief on behalf of the Association as *amicus curiae* in support of Petitioner.

## INTEREST OF AMICUS CURIAE

The Association is an organization of over 17,000 attorneys with nationally recognized expertise in its fields of interest and a long-standing commitment to improvement of the criminal justice system. The Association has been active in this area through *amicus* briefs to this and other courts, testimony before legislative bodies, and the publication of committee reports.

The Association has particular expertise in New York law and procedure. Because the judgment that the Mississippi Supreme Court refused to credit was a finding by New York's highest court that Petitioner's conviction, used as an aggravating circumstance to support the death sentence, was a nullity under New York law, the Association brings a uniquely well-informed viewpoint to this case.

Moreover, although the parties have not emphasized the issue, the judgment below threatens an entire body of jurisprudence outside the death penalty area (*see* Point II, *infra*). Accordingly, the Association believes it can be particularly useful in assisting the Court to place this case into proper perspective.

## STATEMENT OF THE CASE

Petitioner Samuel Bice Johnson was convicted of murder in Mississippi in 1982. In successfully seeking imposition of the death penalty, the State of Mississippi presented to the jury three aggravating circumstances; the one relied on most heavily by the prosecution was Johnson's 1963 second-degree assault conviction in New York. 1/

1/ The conviction was offered as an aggravating circumstance pursuant to Miss. Code Ann. § 99-19-101(5)(b) (Supp. 1987). The prosecutor also offered two other aggravating circumstances, claiming that the capital offense was committed for the purpose of fleeing arrest, *id.* § 5(e), and that the capital offense was "especially heinous, atrocious or cruel," *id.* § 5(h).

The Mississippi Supreme Court conceded that because of the extensive use of the New York conviction by the prosecutor in his argument to the sentencing jury, any infirmity in this aggravating circumstance could not be viewed as harmless error. *Johnson v. State*, 511 So. 2d 1333, 1338 (Miss. 1987), *cert. granted*, 56 U.S.L.W. 3459 (U.S. Jan. 11, 1988).



1. The 1963 New York Conviction.

In 1963, when he was 21 years old, Johnson was convicted of assault in the second degree in Monroe County, New York. *See* N.Y. Penal Law § 243 (McKinney 1962) (now codified at N.Y. Penal Law § 120.05 (McKinney 1980 & Supp. 1987)). Sentenced to a prison term of 1-1/2 to 3 years, he served one year before being paroled for good behavior.

Under then-existing New York law, Johnson had a right to appeal upon the judgment of conviction. N.Y. Code Crim. Proc. Law § 517 (McKinney 1962) (now codified at N.Y. Crim. Proc. Law § 450.10 (McKinney 1983 & Supp. 1988)). Johnson was not advised by either his court-appointed lawyer, the prosecutor, or the court of his right to appeal. *People v. Johnson*, 69 N.Y.2d 339, 341, 506 N.E.2d 1177, 1178, 514 N.Y.S.2d 324, 325 (1987) (per curiam). Under New York law, this failure violated Johnson's constitutional rights as enunciated in *People v. Montgomery*, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969). 2/

Johnson did not discover that he had the right to appeal until the period for initiating an appeal had lapsed. 3/ He then repeatedly petitioned for permission to do so. *People v. John-*

2/ New York courts have applied *Montgomery* retroactively. *See, e.g., People v. Lucci*, 27 N.Y.2d 550, 261 N.E.2d 263, 313 N.Y.S.2d 121 (1970); *People v. Jordan*, 33 A.D.2d 1077, 307 N.Y.S.2d 707 (App. Div. 1970).

3/ Under the New York procedure in effect at the time of Johnson's conviction, Johnson would have had to file a notice of appeal within 30 days of the imposition of his sentence. N.Y. Code Crim. Proc. Law § 521 (McKinney 1962) (now codified at N.Y. Crim. Proc. Law § 460.10 (McKinney 1983 & Supp. 1988)).

*son*, 69 N.Y.2d at 341, 506 N.E.2d at 1178, 299 N.Y.S.2d at 325. In 1967 he filed a *pro se* notice of appeal. (JA. 125) [4] This notice was dismissed by a court clerk in Monroe County who deemed the notice "untimely," not knowing that Johnson had not initially been advised of his right to appeal. *Id.*

Over the next four years, Johnson filed two *pro se* petitions alleging a denial of his right to appeal. *Id.* These applications were denied. When Johnson filed a notice of appeal from one of these denials, the Monroe County public defender's office was appointed to represent him. That office, which was experiencing severe lapses in performance, [5] never perfected the appeal. Thus, when used by Mississippi as an aggravating circumstance in the sentencing phase of Johnson's trial, the 1963 conviction was the unappealed judgment of a trial court.

Questions about the validity of the 1963 conviction could not have been entertained by the Mississippi trial court during the sentencing phase, however. Under Mississippi law, when a prior conviction in another state is utilized to enhance a sentence for a later crime, a defendant who wishes to challenge the predicate conviction is required to do so in the courts of the other state and only then, if successful, mount a collateral attack on the enhanced sentence in Mississippi:

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4/ "JA. ____" references are to pages in the Joint Appendix.

5/ Affidavit of Edward J. Nowak ¶ 2 (appended to Brief of the Attorney General of the State of New York, as *Amicus Curiae* in Support of Petitioner [in seeking Writ of Certiorari] [hereinafter "Attorney General Certiorari Brief"]).



> [A]ny such proceeding should be brought in the state in which such conviction occurred, pursuant to that state's established procedures. Should such proceeding in the foreign state succeed in overturning the conviction, then relief should be sought in Mississippi by petition for writ of error coram nobis. *Phillips v. State*, 421 So. 2d 476, 482 (Miss. 1982).

2. The Vacatur Of The 1963 New York Conviction.

Following the dictates of *Phillips v. State*, Johnson, now represented by current counsel, attacked his 1963 conviction in a further proceeding in the New York courts in 1986. Upon review of its records, the Monroe County district attorney admitted the State's earlier failure to advise Johnson of his right to appeal. *See* Affidavit of Melvin Bressler ¶ 6 (appended to Attorney General Certiorari Brief). However, the State of New York argued in three New York courts that this failure did not entitle Johnson to any relief other than resentencing. *Id.* at ¶¶ 6-8, 11-12.

Although both the Monroe County court and the intermediate appellate court agreed with the State of New York's contention that Johnson was not entitled to the relief he sought, [6] Johnson prevailed in the New York Court of Appeals, which vacated his assault conviction and dismissed the underlying indictment. *People v. Johnson*, 69 N.Y.2d 339, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (1987) (per curiam). Relying on *Montgomery, supra*, New York's highest court held that Johnson had been denied his constitutional right to appeal:

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6/ The opinion of the County Court for Monroe County, which resentenced Johnson but otherwise denied relief, is unreported. (A copy has been lodged with this Court.) The opinion of the Appellate Division, which denied Johnson's motion to review his 1963 conviction, is reported at *People v. Johnson*, 125 A.D.2d 1008, 509 N.Y.S.2d 789 (App. Div. 1986).

> It is undisputed that defendant was never advised of his right to appeal from the assault conviction and that, upon discovering that right, he made several timely and diligent *pro se* attempts to obtain review of the judgment through the avenues available to him at the time. Further, it is undisputed that the actions of this State prevented defendant from ever obtaining the review of the conviction to which he was entitled. 69 N.Y.2d at 341, 506 N.E.2d at 1178, 514 N.Y.S.2d at 325.

The court concluded that the interests of justice would not be served by a new trial since "the records of defendant's trial have been lost, . . . neither reconstruction nor a new trial is possible and . . . defendant has raised appealable issues with possible merit." *Id.* at 342, 506 N.E.2d at 1178, 514 N.Y.S.2d at 325.

The court's conclusion was bolstered by the fact that Johnson was prepared to present several significant constitutional challenges to his 1963 conviction. Chief among these were allegations that a confession used to convict him had been elicited involuntarily and without the presence of counsel, and that there had been no hearing to determine the voluntariness of the confession. (JA. 89-90, 137-39); *see also* Affidavit of Edward J. Nowak ¶ 4 (appended to Attorney General Certiorari Brief).

As a result of the Court of Appeals' ruling, the 1963 conviction was nullified -- i.e., under New York law, it was rendered void *ab initio*. *Burrell v. McMann*, 51 Misc. 2d 185, 188, 273 N.Y.S.2d 9, 12 (Sup. Ct. 1966) (by vacating judgment of conviction, "court declared that all proceedings relating thereto were a nullity"); *cf. People ex rel. Metz v. Lavalee*, 56 Misc. 2d 841, 290 N.Y.S.2d 465 (Sup. Ct. 1968); *In re Grube's Will*, 162 Misc. 267, 294 N.Y.S. 311 (Sur. 1937).



3. The Mississippi Supreme Court
Refuses To Recognize The Vacatur.

Prior to 1987, Johnson's various appeals in the Mississippi courts of his 1982 murder conviction and death sentence were unsuccessful. [7/] In light of his successful attack on the 1963 conviction in New York, Johnson amended his petition for post-conviction relief in Mississippi to reflect the New York Court of Appeals decision vacating his 1963 conviction and dismissing the indictment.

Although Johnson had done just what the Mississippi Supreme Court had prescribed in *Phillips*, on May 27, 1987 the Mississippi Supreme Court refused to recognize New York's vacatur of the 1963 conviction and held that Johnson was not entitled to resentencing. *Johnson v. State*, 511 So. 2d 1333, 1339 (Miss. 1987), *cert. granted*, 96 L. Ed. 2d 646, 56 U.S.L.W. 3459 (U.S. Jan. 11, 1988). [8/] The court held that "a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition." *Id.* at 1338. Further, the Mississippi Supreme Court impugned the New York proceed-

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[7/] Johnson's conviction and sentence were affirmed on direct appeal by the Mississippi Supreme Court. *Johnson v. State*, 477 So. 2d 196 (Miss. 1985). His petition to this Court for a writ of certiorari was denied, *Johnson v. Mississippi*, 476 U.S. 1109 (1986) (Brennan and Marshall, J.J., dissenting), as was his petition for rehearing, *Johnson v. Mississippi*, 106 S. Ct. 2930 (1986). On August 4, 1986, Johnson filed a motion for post-conviction relief under the Mississippi Uniform Post-Conviction Relief Act, Miss. Code Ann. § 99-39-1 *et seq.* (Supp. 1986). That same day, the Mississippi Supreme Court granted a stay of execution (then scheduled for August 6, 1986).

[8/] The Mississippi Supreme Court denied petitioner's request for rehearing on July 15, 1987. *Johnson v. State*, DP No. 43, slip op. (Miss. July 15, 1987).

ings as not "truly adversarial" because the State's attorney had "no significant interest or concern in vouchsafing the validity of [Johnson's] 1963 conviction. . . ." *Id.*

In a dissenting opinion joined by two justices, Justice Robertson criticized the majority for "tak[ing] a swipe at the New York action [in] suggesting that the Court of Appeals' March 24, 1987, order should be given less than full faith and credit." *Id.* at 1343 (Robertson, J., dissenting). The dissenting opinion concluded that "vitiation of Johnson's 1963 New York conviction undermines confidence in the outcome of the penalty phase of his capital murder trial." *Id.* at 1345.

## SUMMARY OF ARGUMENT

The State of Mississippi relied on the full faith and credit clause when, in presenting a New York conviction as an aggravating circumstance in a capital sentencing proceeding, it assigned complete effect to the New York judgment. Mississippi's adamant refusal to allot corresponding recognition to its sister state's subsequent vacatur of that conviction clearly violates the full faith and credit clause.

Apart from the full faith and credit clause, it is settled that the Constitution requires a defendant subject to enhanced sentencing based on a prior conviction to be given the opportunity to challenge the validity of that conviction. By requiring a defendant to make such a challenge in the foreign state rather than hearing the claims in its own courts, Mississippi affirmatively assumes the obligation of giving effect to the resulting foreign court ruling. Thus, when New York vacated the predicate conviction, Mississippi, having deflected that examination to a sister state, was required to give full effect to that state's vacatur and undo the proceedings concededly based substantially upon it.



## ARGUMENT

### I.

### THE MISSISSIPPI SUPREME COURT VIOLATED THE FULL FAITH AND CREDIT CLAUSE IN REFUSING TO RECOGNIZE NEW YORK'S VACATUR OF THE PRIOR NEW YORK CONVICTION USED TO SUPPORT THE DEATH PENALTY

Article IV, section 1 of the Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State." This Court has mandated that "the judgment of a state court should have the same credit, validity, *and effect*, in every other court of the United States, which it had in the state where it was pronounced." *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass'n*, 455 U.S. 691, 704 (1982) (courts of North Carolina required to recognize judgment of Indiana court) (emphasis added) (quoting *Hampton v. M'Connel*, 16 U.S. (3 Wheat.) 234, 235 (1818) (Marshall, C.J.)); *see also Johnson v. Muelberger*, 340 U.S. 581 (1951).

The principle that judicial comity is fundamental in a nation molded from many diverse states has been recognized since the inception of our federal system. Even under the Articles of Confederation, state courts were required to give full effect to the judgments of sister states. *See* Note, *The United States and the Articles of Confederation*, 88 Yale L.J. 142, 159–60, 162 n. 37 (1978) (discussion of similar comity clause in Constitution's forerunner; comparison of texts).

The importance of this clause to the integrity of our federal system of justice is manifest:

> The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin. *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276–77 (1935).

A. Mississippi May Not Use The Nullified 1963 Conviction To Enhance Punishment.

The full faith and credit clause requires that a state recognize criminal judgments rendered in a sister state in the same way it would if they were rendered in its own courts. *See Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 291–92 (1888). 9/ Thus, Mississippi is itself granting full faith and credit to foreign convictions when it introduces them to support enhanced sentencing under its habitual felony statute. Miss. Code. Ann. § 99-19-81 (Supp. 1987) (deeming as predicate convictions in habitual criminal sentencing convictions rendered "in this state *or elsewhere*") (emphasis added); *see also Watson v. State*, 291 So. 2d 741, 743 (Miss. 1974) (previous conviction under law of Mississippi or another state may be used to enhance punishment); *Ard v. State*, 403 So. 2d 875, 876 (Miss. 1981); *Usry v. State*, 378 So. 2d 635, 637 (Miss. 1979). Specifically, Mississippi relied upon the full faith and credit clause when it presented Johnson's 1963 New York conviction to the jury as an aggravating circumstance justifying the death penalty in this case. It asked the jury to accept that conviction as a valid judgment, as if it had been rendered by a Mississippi court.

When New York's highest court invalidated the 1963 judgment, however, Mississippi refused to give that decision any effect at all. This it could not constitutionally do. "The Full Faith and Credit Clause is not to be applied, accordion-like, to accommodate our personal predilections." *Estin v. Estin*, 334 U.S. 541, 545–46 (1948). Rather, the full faith and credit clause requires that the 1987 New York vacatur be given the same effect in Mississippi as it would be had it been rendered in a Mississippi court. Mississippi would not use a vacated Mississippi conviction to enhance a sentence in its courts. Hence, it may not do so with a vacated foreign conviction.

The decision of the Mississippi Supreme Court in this case runs counter not only to settled principles of federalism but also to principles expressly enunciated in the past by the Mississippi Supreme Court itself. *See Mississippi State Bar v. Phillips*, 385 So. 2d 943, 945 (Miss. 1980) ("We are bound to give full faith and credit to judgments of our sister states and

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9/ This principle is subject, however, to the so-called "penal exception" to the full faith and credit clause, which provides only that a state is not required to enforce the penal judgment of a foreign state. *See Williams v. North Carolina*, 317 U.S. 287 (1942); *Huntington v. Attrill*, 146 U.S. 657, 668-69 (1892); *cf. The Antelope*, 23 U.S. (10 Wheat.) 66, 122–23 (1825) (it is "almost superfluous to say . . ." that "[t]he courts of no country execute the penal laws of another"). The policy underlying the full faith and credit clause is preserved despite the exception, however. While a state may demur from enforcing a foreign state's penal judgment, it is required to extradite the defendant so that the rendering state may enforce its own conviction. *See Puerto Rico v. Branstad*, 107 S. Ct. 2802 (1987) (if extradition papers facially in order, governor must extradite person sought by sister state; no "public policy" exception).

In any event, the penal exception has no application to this case. Enforcement of the 1963 New York conviction is not at issue here -- indeed, Johnson has already paid the full penalty of incarceration meted out by New York. Mississippi is being asked to give full faith and credit to the New York judgment, not to enforce it.

the federal system, even to the recitation of facts in decisions of their appellate courts.").

In sum, the full faith and credit clause requires Mississippi to consider the 1963 conviction a nullity that cannot support an enhanced sentence on a subsequent criminal conviction.

B. Mississippi May Not Impugn The Ruling Of The New York Court Of Appeals.

Perhaps seeking to buttress its refusal to accept the vacatur, the Mississippi Supreme Court cast aspersions on the proceedings in New York: "We deem it important to add . . . that there is no evidence or indication that the post-conviction relief proceedings in the New York courts were truly adversarial." 511 So. 2d at 1338. In their dissent to that opinion, three justices correctly stated that the majority's characterization was "disingenuous" and a "cynical assumption that the New York Court did less than its duty. . . ." *Id.* at 1343-45 (Robertson, J., dissenting).

Such second-guessing is precisely what the full faith and credit clause forbids. Absent a basis to allege that the vacatur was constitutionally infirm, *see Griffin v. Griffin*, 327 U.S. 220, 228 (1946) (judgment obtained in violation of procedural due process not entitled to full faith and credit in another state), Mississippi was bound to respect New York's judgment, period.

The Mississippi court's reference to the "extreme likelihood" that foreign courts could vacate convictions on which Mississippi relied in adjudging the death penalty, 511 So. 2d at 1338, is not only without foundation in the more than two



centuries of experience under the full faith and credit clause, but is exactly the sort of consideration that the clause is meant to forbid. *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948) (if in application of full faith and credit clause local policy must give way, such is requirement of federal system).

In any event, the Mississippi Supreme Court's characterization of the proceedings in New York does not comport with the facts.

First, the State of New York vigorously opposed the relief Johnson sought in his writ of coram nobis. *See* Affidavit of Melvin Bressler ¶¶ 8-12 (appended to Attorney General Certiorari Brief). That this was a credible defense is shown by the strength it carried in the Monroe County Court and the Appellate Division, which both sided with the State on the key issue of conviction vacatur. *People v. Johnson*, 125 A.D.2d 1008, 509 N.Y.S.2d 789 (App. Div. 1986); *People v. Johnson*, No. 32/63, slip op. (Monroe County Ct. Oct. 29, 1986). The State's factual concessions regarding the failure to advise Johnson of his right to appeal and the loss of all trial records -- facts clearly undeniable -- cannot possibly be cited to impugn the professional and ethical defense put forth by the State. Mississippi's thinly veiled allegation of collusion between Petitioner and officials of the State of New York is unfounded.

Second, the Court of Appeals' decision was squarely based on regularly-applied principles of New York law. New York provides that every convicted defendant has an absolute and fundamental right to appeal a conviction. N.Y. Crim. Proc. Law § 450.10 (McKinney 1983 & Supp. 1988); *see also People v. Rivera*, 39 N.Y.2d 519, 349 N.E.2d 825, 384 N.Y.S.2d 726 (1976); *People v. Montgomery*, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S. 156 (1969). *Montgomery* declared

that the State had an affirmative duty under the Federal Constitution to inform the indigent defendants of this right to appeal. *Id.* at 132, 299 N.Y.S.2d at 159. [10/] This holding was grounded on both due process and equal protection, *id.* at 132, 299 N.Y.S.2d at 159-60, the latter derived from this Court's pronouncement that an indigent defendant cannot be deprived of a vested right to appeal simply because of his poverty. *Douglas v. California*, 373 U.S. 353, 357 (1963); *cf. Evitts v. Lucey*, 469 U.S. 387, 391-400 (1985) (due process guarantees criminal defendant effective assistance of counsel on first appeal as of right). *Douglas* found constitutional error when California failed to provide the benefit of counsel to defendants who were appealing their convictions as of right; in the case at bar, Johnson did not have the opportunity to invoke his right to appeal -- even though there existed serious doubts about the constitutional validity of his alleged confession and his interrogation without counsel.

The courts of New York have for decades granted relief to defendants whose right to appeal was frustrated by the State. *See People v. Rivera*, 39 N.Y.2d 519, 349 N.E.2d 825, 384 N.Y.S.2d 726 (1976); *People v. Jordan*, 33 A.D.2d 1077, 307 N.Y.S.2d 707 (App. Div. 1970); *People v. Ramos*, 30 A.D.2d 848, 292 N.Y.S.2d 938 (App. Div. 1968); *People v. Spencer*, 61 Misc. 2d 399, 305 N.Y.S.2d 906 (Sup. Ct. 1969), *aff'd*, 37 A.D.2d 920, 326 N.Y.S.2d 981 (App. Div. 1971).

10/ As noted above, New York courts have applied *Montgomery* retroactively. *See* note 2, *supra*.



Thus, the New York courts here did no more or no less than they would have done for any other appellant, and the Mississippi Supreme Court attack was not only constitutionally forbidden but factually inaccurate as well.

## II.

## MISSISSIPPI IS REQUIRED TO PERMIT AN ATTACK ON THE CONSTITUTIONALITY OF A CONVICTION USED TO ENHANCE PUNISHMENT AND IS BOUND BY THE OUTCOME OF THE PROCEDURE IT HAS PRESCRIBED FOR SUCH AN ATTACK

As Petitioner argues in his brief (Brief of Petitioner at Point II), the heightened requirements for accuracy in capital cases command that the constitutionally suspect 1963 conviction not be used as a basis to condemn Johnson to death. But an affirmance in this case will have ramifications that go well beyond the death penalty context. As we show below, affirmance would upset a well-settled body of consitutional law in non-capital cases -- squarely grounded on the decisions of this Court -- preventing the use of invalid prior convictions in subsequent guilt or sentencing proceedings.

### A. Mississippi Must Accommodate An Attack On The Constitutionality Of A Prior Conviction Offered To Enhance Punishment.

This Court has made clear that it is unconstitutional for a state to use an invalid conviction to support guilt or enhance punishment. *See, e.g., United States v. Tucker*, 404 U.S. 443, 447 (1972) (use of an invalid prior conviction in sentencing deliberations unconstitutional); *Burgett v. Texas*, 389 U.S. 109, 114-16 (1967) (use of invalid prior conviction to support guilt

or enhance punishment unconstitutional). Lower courts have routinely applied this principle. *See, e.g., Reeves v. Mabry*, 615 F.2d 489, 491 (8th Cir. 1980) (jury assessing punishment under state habitual criminal statute "may not constitutionally enhance punishment by reference to a previous conviction that had been obtained in violation of a constitutional right of the defendant"); *United States v. Dorman*, 496 F.2d 438, 441 (4th Cir.) (invalid convictions cannot be used to enhance a sentence), *cert. denied*, 419 U.S. 945 (1974); *Kelley v. United States*, 487 F.2d 898, 899 (6th Cir. 1973) (per curiam) (same); *Lipscomb v. Clark*, 468 F.2d 1321, 1323 (5th Cir. 1972) (same); *Murgia v. United States*, 448 F.2d 1275, 1276 (9th Cir. 1971) (per curiam) (same); *United States v. Martinez*, 413 F.2d 61, 63 (7th Cir. 1969) (previous conviction tainted by denial of defendant's rights to due process and effective assistance of counsel cannot be used to enhance punishment even if constitutional defect does not appear on the face of the record); *United States ex rel. Easterling v. Wilkins*, 303 F.2d 883, 884 (2d Cir. 1962) (invalid conviction cannot be used in sentencing defendant as multiple offender).

Accordingly, when any prior conviction -- whether from that state or another state (or a federal conviction) -- is offered to enhance punishment, the defendant must be permitted to attack its constitutionality. *See, e.g., United States ex rel. Savini v. Jackson*, 250 F.2d 349, 355 (2d Cir. 1957) ("To the extent that any State makes its penal sanctions depend in part on the fact of prior convictions elsewhere, necessarily *it must assume the burden of meeting attacks on the constitutionality of such prior convictions.*") (emphasis added).

The underlying rationale for this well-settled principle of constitutional law is compelling; to permit a constitutionally infirm conviction to enhance punishment for another offense



is to allow an unconstitutional procedure to injure a defendant twice. *Burgett*, 389 U.S. at 115. In addition, the errors coincident with those constitutional violations render their reliability deeply suspect. *See Townsend v. Burke*, 334 U.S. 736, 741 (1948). Here, for example, the basis for Johnson's principal constitutional challenge to his New York conviction was the denial of counsel at a pre-trial interrogation in which a confession was obtained. (JA. 89-90, 137-39); *see also* Affidavit of Edward J. Nowak ¶ 4 (appended to Attorney General Certiorari Brief). In addition, no hearing was held on the issue of the voluntariness of Johnson's statement, as required by *Jackson v. Denno*, 378 U.S. 368 (1964). This case is a typical example of the sort of constitutional deprivation under the fifth and sixth amendments which has led this and other courts to mandate that an invalid conviction be disregarded for enhancement purposes. *See, e.g., Burgett*, 389 U.S. at 115; *Tucker*, 404 U.S. at 447; *Kelley*, 487 F.2d at 899; *Jackson*, 250 F.2d at 353-54; *Lipscomb v. Clark*, 468 F.2d at 1323, *Mullins v. Lane*, 484 F. Supp. 237, 239 (E.D. Tenn. 1979).

Mississippi has recognized the obligation to permit such challenges to prior convictions, but has chosen to require the defendant to attack a prior foreign state conviction in that foreign state's courts, not in Mississippi. *Phillips v. State*, 421 So. 2d 476, 481-82 (Miss. 1982). Citing the "potential difficulties inherent" in permitting defendants to challenge foreign state convictions in Mississippi courts, (*id.* at 480), the Mississippi Supreme Court requires that

> [any] assault upon the constitutionality of a prior conviction should be conducted in the form of an *entirely separate procedure* solely concerned with attacking that conviction. . . . [A]ny such proceeding should be brought in the state in which such conviction occurred, pursuant to that state's established procedures. *Should such proceeding in the foreign state succeed in*

*overturning the conviction, then relief should be sought in Mississippi* by petition for writ of error coram nobis." *Id.* at 480–81 (emphasis added).

Thus, to exercise his right to challenge the constitutionality of the prior conviction being offered to the sentencing jury, Johnson was required to initiate an "entirely separate proceeding" in New York. This he did, and he prevailed in the New York Court of Appeals.

B. Mississippi Is Bound To Give Full Effect To The New York Vacatur.

Having set up the procedure in *Phillips* and expressly assumed the risk that a defendant would successfully overturn a prior conviction in a foreign state, Mississippi cannot now renege on this procedure and refuse to recognize the result in the other state's courts. *See Wheat v. Thigpen*, 793 F.2d 621, 624–25 (5th Cir. 1986) (states must follow announced procedural rule or face federal court scrutiny), *cert. denied*, 107 S. Ct. 1566 (1987); *cf. Bouie v. Columbia*, 378 U.S. 347 (1964) (state supreme court, in giving new interpretation of law retroactive effect to detriment of defendants, violates due process). Doing so would violate its original obligation to permit a constitutional attack on the predicate conviction.

Under the procedure mandated by *Phillips*, the criminal trial court acted properly in presuming the 1963 conviction to be valid. Indeed, under *Phillips*, that court could not entertain any challenges to the predicate conviction. But the inescapable corollary to the rule was to prohibit Mississippi from now relying (as it does) on the "sufficient finality" of the 1963 conviction at the time when it was submitted to the jury to support a sentence of death.



Yet the Mississippi Supreme Court did just that:

> The fact remains that Johnson was convicted in 1963 by a New York court . . . for which he was imprisoned in that state. No New York court extended Johnson relief from his conviction before Johnson paid his debt to the state. *If his crime was* serious enough for him to be convicted and *final enough for him to serve time* in a penal institution, *it had sufficient finality to be considered as an aggravating circumstance by a jury of this state*. 511 So. 2d at 1339 (emphasis added).

This "sufficient finality" standard, stated without rationale or authority, would preclude any review of convictions nullified after the defendant has "served time in a penal institution" -- even if subsequent proceedings have cleared him from any criminal guilt.

If Mississippi's argument were accepted, a defendant would seek appeal or vacatur of a prior conviction only as an academic exercise. Once the defendant is convicted and serves his time, Mississippi considers the taint indelible no matter what the effect of the nullification is in the state where the original conviction was rendered. A subsequent appellate or collateral invalidation of the conviction exacts no compromise or reconsideration from Mississippi. [11/] This conflicts with this Court's precedents. *See, e.g., Kremer v. Chemical Constr. Corp.*, 456 U.S.461, 482 (1982) ("A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment.") (footnote omitted).

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[11/] The Mississippi Supreme Court hinted that the outcome of the case would be different if the conviction were vacated on "direct appeal." 511 So. 2d at 1338. Any distinction between collateral and

New York's previous unconstitutional action against Johnson had spent its force until Mississippi madeit a legal basis for increased sanctions of its own. Now that New York has recognized and cured its error -- as best it could in the circumstances -- so must Mississippi cure its consequent error.

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[11]/Continued

direct appeal is irrelevant to the policies underlying the constitutional precepts involved here. Moreover, as fully explicated in the Attorney General Certiorari Brief at 12 n.8, the proceedings here were in fact a direct appeal under New York law. Finally, it would be manifestly inappropriate to apply such a distinction in this case -- where the precise constitutional violation was the denial of a direct appeal.



## CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Mississippi should be reversed and the cause remanded with instructions that Petitioner be sentenced to a penalty less than death.

Dated: February 25, 1988
New York, New York

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